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FILED & ENTERED

MAR 18 2022

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
BY Ilewis DEPUTY CLERK

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:	)	Case No.: 2:16-bk-24758 RK
	)	
SWING HOUSE REHEARSAL AND	)	Chapter 11
RECORDING, INC.,	)	
	)	Jointly Administered with
Debtor.	)	
In re	)	Case No.: 2:16-bk-24760 RK
	)	
PHILIP JOSEPH JAURIGUI,	)	
	)	
Debtor.	)	
JONATHAN MOVER,	)	Adv. No. 2:18-ap-01351 RK
	)	
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR LEAVE TO FILE FIRST
	)	AMENDED COMPLAINT
PHILIP JOSEPH JAURIGUI,	)	
	)	
Defendant.	)	
	)	Adv. No.: 2-18-ap-01352 RK
SWING HOUSE REHEARSAL AND	)	
RECORDING, INC.,	)	DATE: March 15, 2022
	)	TIME: 2:30 p.m.
Plaintiff,	)	CTRM: 1675
v.	)	PLACE: 255 E. Temple Street
	)	Los Angeles, CA 90012
PHILIP JOSEPH JAURIGUI,	)	
	)	
Defendant.	)	

1 Plaintiff's *Motion For Leave To File First Amended*  
2 *Complaint* ("Motion") came before the Court on March 15, 2022,  
3 appearances are noted on the Court record, all interested  
4 parties having been duly served, the Court having considered all  
5 of the papers submitted, along with any arguments of counsel,  
6 for the reasons stated on the record at the hearing on the  
7 Motion and in the court's tentative ruling on the Motion posted  
8 online on the court's website before the hearing (copy attached  
9 hereto), and for good cause shown; it is:

10 ORDERED that the Motion is denied.

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25 Date: March 18, 2022



26 Robert Kwan  
27 United States Bankruptcy Judge  
28

ATTACHMENT – COURT’S TENTATIVE RULING

Updated tentative ruling as of 3/15/22:

Deny Plaintiff Jonathan Mover’s Motion for Leave to File First Amended Complaint to Conform to Proof. Mover seeks to amend his complaint in Adversary No. 2:18-ap-01351-RK post-trial, over three years after he filed the original complaint, to amend the complaint to add a claim under 11 U.S.C. § 727(a)(7) against Defendant Philip Jaurigui, pursuant to Fed. R. Civ. P. 15(b)(2) (Civil Rule). Although Civil Rule 16 ordinarily binds parties to the terms of the pretrial order and may be modified at trial only to prevent a manifest injustice, most courts have held that Civil Rule 16 must be read in consideration of Civil Rule 15(b). See Wright and Miller, Federal Practice and Procedure) § 1491.

Generally, leave to amend is within the discretion of the court. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). Factors to consider in allowing an amendment include: (1) bad faith or dilatory motive on the part of the movant, (2) undue delay, (3) undue prejudice to the opposing party by virtue of allowing the amendment, and (4) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Prejudice to the opposing party is the most important factor." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). On this record, amending the complaint to add the 11 U.S.C. § 727(a)(7) would be unduly prejudicial to defendant because it appears that Plaintiff Mover was aware of the facts that would support his unpleaded claim under 11 U.S.C. § 727(a)(7) before or during trial, the court completed the trial without him requesting to amend the complaint during trial, and Defendant Jaurigui had no opportunity to defend against the unpleaded claim. See *Carter v. National R.P. Passenger Corp.*, 413 F.Supp.2d 495, 501 (E.D. Pa. 2005).

The rule governing amendment of pleadings to conform to the evidence is Civil Rule 15(b)(2), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7015 (Bankruptcy Rule), which provides: "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." The plain language of Civil Rule 15(b)(2) specifically refers to an unpleaded issue being tried by express or implied consent, and thus consent is a requirement under Civil Rule 15(b)(2) trial of an unpleaded issue. See *Prieto v. Paul Revere Life Insurance Co.*, 354 F.3d 1005, 1012 (9th Cir. 2004). There is no evidence showing that defendant consented to trying the unpleaded issues raised by a 11 U.S.C. § 727(a)(7) claim, either expressly or impliedly, as argued by Defendant Jaurigui in his written opposition.

Plaintiff Mover does not argue that Defendant Jaurigui consented to trying the unpleaded claim under 11 U.S.C. § 727(a)(7). Rather, Plaintiff Mover argues that "consent is not a factor because Section 727(a)(7) [by] its very nature is inclusive of the claims already plead and litigated." Motion at 6. Plaintiff Mover does not cite any

1 authority to support this argument. The Ninth Circuit case cited by the court above,  
2 Prieto v. Paul Revere Life Insurance Co., 354 F.3d at 1012, is contrary to Plaintiff  
3 Mover's argument.

4 Instead, Plaintiff Mover apparently relies upon a Seventh Circuit decision in *Matter of*  
5 *Krehl*, 86 F.3d 737 (7th Cir. 1996) for the proposition that it allowed the addition of a 11  
6 U.S.C. § 727(a)(7) claim without consideration of the defendant's consent. Plaintiff  
7 Mover misreads *Krehl* because the added claim was under 11 U.S.C. §727(a)(3) rather  
8 than 11 U.S.C. §727(a)(7) and the Seventh Circuit held that it did not have to consider  
9 the consent issue for the added claim because debtor's discharge was already being  
10 denied under other provisions of 11 U.S.C. § 727. Because the Seventh Circuit did not  
11 decide whether consent was needed to add another claim under Civil Rule 15(b)(2) and  
12 did not specifically address the addition of a 11 U.S.C. § 727(a)(7) claim, the court does  
13 not find that *Krehl* is instructive here.

14 "Implied consent is not established merely because one party introduced evidence  
15 relevant to an unpleaded issue and the opposing party failed to object to its introduction.  
16 It must appear that the parties understood the evidence to be aimed at the unpleaded  
17 issue." *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576, 595  
18 (6th Cir. 2015) (citation omitted). "Otherwise, the court runs the risk of violating the  
19 defendant's procedural due process rights by imposing judgment upon a claim against  
20 which the defendant did not know he had to defend himself." *Id.* "To establish implied  
21 consent, the [plaintiff] must demonstrate that [the defendant] understood evidence had  
22 been introduced to prove [the new issue], and that [the new issue] had been directly  
23 addressed, not merely inferentially raised by incidental evidence." *In re Acequia, Inc.*,  
24 34 F.3d 800, 814 (9<sup>th</sup> Cir. 1994) (citation omitted). Plaintiff Mover has failed to make  
25 this showing in his moving and reply papers as to his proposed 11 U.S.C. § 727(a)(7)  
26 claim.

27 Appearances are required on 3/15/22, but counsel and self-represented parties must  
28 appear through Zoom for Government in accordance with the court's remote  
appearance instructions.